

STATE OF MICHIGAN
COURT OF APPEALS

In re K. SLATER, Minor.

UNPUBLISHED
December 15, 2015

No. 329176
Gladwin Circuit Court
Family Division
LC No. 14-000096-NA

Before: GADOLA, P.J., and K. F. KELLY and FORT HOOD, JJ.

PER CURIAM.

Respondent appeals as of right from an order terminating her parental rights to her child pursuant to MCL 712A.19b(3)(g) (failure to provide proper care or custody) and (j) (reasonable likelihood of harm). We affirm.

I. BASIC FACTS

In October 2014, the Department of Health and Human Services (DHHS) filed a petition asking the court to take protective custody of the child after caseworker Eric Schultz found the two-year-old child naked and unsupervised in respondent's apartment. Schultz and a deputy sheriff described the apartment as "filthy" and "in disarray." In the kitchen, Schultz observed a "feces filled diaper," dirty dishes, and a floor strewn with items. Schultz also found piles of animal feces in the child's bedroom. Schultz reported that the child tested positive for opiates and acetaminophen at birth, and respondent recently tested positive for methamphetamines.

At respondent's request, the trial court appointed an attorney to represent her. At the adjudication, three witnesses testified, including respondent. Respondent's counsel did not call any witnesses and he only cross-examined respondent. In closing, respondent's counsel remarked, "All the evidence appears to be very much in favor, but it's inevitable the Court will take jurisdiction here. I have nothing further." The court then took jurisdiction over the child pursuant to MCL 712A.2(b)(2) and ordered respondent to comply with the case services plan.

Respondent struggled to comply with services. Petitioner referred respondent to a "color code" drug testing program and drug treatment with Every Day Matters, but she was removed from the programs after failing to attend and comply with the requirements. Petitioner referred respondent for a substance abuse assessment, which she completed; but she failed to follow the assessment's treatment recommendations. Petitioner referred respondent to parenting classes with Adoption Option, Inc., to the Families First program, and to attend parenting time.

Although she participated in some of these parenting services, respondent missed some appointments and showed up late to many others. Petitioner provided information on how respondent could apply for food and cash assistance, but respondent failed to follow through. Respondent completed a psychological assessment, but she failed to follow the treatment recommendations. Finally, petitioner referred respondent to Michigan Works! Association for employment assistance, but respondent remained unemployed.

In May 2015, petitioner filed a supplemental petition to terminate respondent's parental rights pursuant to MCL 712A.19b(3)(g) and (j). At the pretrial for the termination hearing, counsel told the trial court that respondent

does not communicate with me. She does not call me. If I do talk to her face-to-face, in person, there seems to be a sort of dismissive attitude where what I say just goes in one ear and out the other. So this has been a totally frustrating experience trying to get her on board with helping with her own defense and she's not doing that.

Respondent did not appear at the termination hearing held on June 8, 2015.¹ In explanation, her counsel told the trial court, "Your Honor I have not heard from [respondent] since the last family team meeting some time ago. She makes no attempt to contact me so I do not know what to expect today."

At the termination hearing, Dr. Gabriela Eyal, an expert in clinical psychology, testified that the child suffered from Disinhibited Attachment Disorder and ADHD. She described the child's symptoms as a lack of stranger anxiety, a lack of sensitivity to cold and heat, a tendency to shove food in his mouth, and cruelty to pets. Eyal recommended the child stay with a caregiver who could provide emotional support, contain the child's behaviors, and develop a working relationship with a professional therapist. Respondent's counsel asked one question on cross-examination about whether Eyal had ever personally seen the child exhibit cruelty toward pets, and she responded that the behavior was reported by foster care.

Sandra Avery testified that she oversaw 12 weeks of parenting classes and 7 weeks of parenting visits for respondent. Avery said that respondent attended 10 of the 12 parenting classes, and although she showed more consistency in her parenting behavior over time, she was frequently late to parenting visits. Avery described the bond between respondent and the child as a friendly bond, rather than a parent-child bond. On cross-examination, respondent's counsel asked if most of Avery's clients showed a lack of parenting skills, to which Avery responded,

¹ Respondent also failed to appear at hearings held on February 23, 2015, April 13, 2015, and May 19, 2015. Respondent's counsel stated that he did not provide respondent written notice of the April 13, 2015 hearing. The trial court sent respondent a summons ordering her to appear at the termination hearing and notifying her that if she failed to appear she could be held in contempt of court and a bench warrant could be issued for her arrest. According to the proof of service, respondent was served at the DHHS office on May 21, 2015.

“All of our clients are referred by DHS because their children have been removed.” Counsel also asked if respondent benefitted from the parenting sessions, to which Avery responded that respondent seemed to benefit, but she failed to consistently apply what she learned.

Finally, caseworker Sarah Bearss testified that respondent participated in parenting classes and had undergone a psychological evaluation and a substance abuse assessment, but she failed to follow through with her substance abuse treatment recommendation. Bearss believed respondent’s substance abuse contributed to her inconsistent parenting. Bearss explained that respondent failed to follow through with state assistance programs or to provide any proof of income. She testified that the last time she visited respondent’s home in March 2015, the kitchen was still dirty, and since that time, respondent refused to allow Bearss to see the home. Respondent’s counsel did not ask Bearss any questions on respondent’s behalf.

Respondent’s counsel did not call any witnesses at the termination hearing. In closing, he stated the following:

When this case first started, I had high hopes that it would go fairly smoothly because [respondent] insisted she had no drug problem and—and would cooperate with testing and that would go smoothly and so on. It didn’t turn out that way at all. I’ve been very frustrated with the case, a very non-communicative client, she shows no inclinations to—to really want to engage any of the problems and does not call me. It’s very frustrating. If I keep going it would sound like I’m more or less not in—not in support of my client when it—were—where as I am. I’m just very frustrated that she had every opportunity to—to keep her child. There was no reason that this case should have gone this far, I didn’t think. Except for her not following through with what she was asked to do.

The trial court found that termination was warranted under both MCL 712A.19b(3)(g) and (j), and that termination was in the child’s best interests.

II. ANALYSIS

On appeal, respondent does not challenge the trial court’s findings regarding the statutory grounds for termination or the child’s best interests. Rather, respondent argues that we should reverse the termination order because her attorney was ineffective. We disagree.

A respondent in a termination of parental rights proceeding has the right to counsel. MCL 712A.17c(4); *In re Powers*, 244 Mich App 111, 121-122; 624 NW2d 472 (2000). The right to counsel is the right to the effective assistance of counsel. *People v Vaughn*, 491 Mich 642, 669; 821 NW2d 288 (2012). In a termination case, this Court “appl[ies] by analogy the principles of ineffective assistance of counsel as they have developed in the context of criminal law.” *In re Trowbridge*, 155 Mich App 785, 786; 401 NW2d 65 (1986).

Respondent did not move for a new trial or an evidentiary hearing below, so our review of her claim is limited to errors apparent on the record. *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000). To prove ineffective assistance of counsel, respondent must show that (1) counsel’s performance “fell below an objective standard of

professional reasonableness,” and (2) “but for counsel’s error, the result of the proceeding would have been different.” *People v Fyda*, 288 Mich App 446, 450; 793 NW2d 712 (2010).

Respondent argues that her attorney failed to advocate on her behalf in his closing arguments and throughout the proceedings. An attorney’s “role is to advocate for his client and follow his client’s wishes if possible.” *People v Dendel*, 481 Mich 114, 136; 748 NW2d 859, amended on other grounds 481 Mich 1201 (2008) (CORRIGAN, J., concurring). The content of a closing argument is a matter of trial strategy and is not typically grounds for establishing deficient performance. *In re Rogers*, 160 Mich App 500, 505; 409 NW2d 486 (1987).

In this case, respondent’s counsel repeatedly referenced his frustration with respondent’s lack of communication and engagement in the proceedings. Although it appears that counsel’s efforts were legitimately frustrated by respondent’s behavior, it is difficult to point to an instance where counsel advocated for respondent and against the termination of her parental rights, as he was appointed to do. When the trial court took jurisdiction over the child, respondent’s counsel said nothing positive on respondent’s behalf, and instead told the court that it was “inevitable the Court will take jurisdiction here.” At the termination hearing, counsel told the court that he was frustrated with the case, and that respondent “show[ed] no inclinations to—to really want to engage any of the problems” related to the care of her son. However, even if the conduct of respondent’s counsel fell below an objective standard of professional reasonableness, respondent cannot demonstrate prejudice arising from counsel’s actions.

Jurisdiction was clearly established in this case pursuant MCL 712A.2(b)(2), considering the poor condition of respondent’s home, her admitted drug use, and her positive drug tests. Petitioner made reasonable reunification efforts by offering respondent numerous services, including drug programs and testing, parenting classes, parenting visits, food and cash assistance, and a psychological assessment. However, respondent did not comply with or benefit from the services offered. Considering respondent’s lack of compliance with her case services plan, her history of substance abuse, and her history of leaving her young child unsupervised, clear and convincing evidence supported termination under MCL 712A.19b(3)(g) and (j). Further, testimony presented at the termination hearing demonstrated a lack of a parent-child bond between respondent and the child, called into doubt respondent’s parenting ability, and showed that the child had a strong need for permanency, stability, and finality; thus, the trial court properly found that termination was in the child’s best interests under MCL 712A.19b(5).

In sum, respondent’s claim of ineffective assistance fails because, regardless of the level of counsel’s advocacy, respondent cannot show a reasonable probability that the outcome of the proceedings would have been altered if counsel acted differently. *Fyda*, 288 Mich App at 450. The record makes clear that respondent is responsible for the circumstances that resulted in the termination of her parental rights.

Affirmed.

/s/ Michael F. Gadola
/s/ Kirsten Frank Kelly
/s/ Karen M. Fort Hood